Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

RONALD T. FERGUSON,

Petitioner,

v.

CSX TRANS INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

LAWRENCE R. COHAN
Counsel of Record
ANAPOL, SCHWARTZ, WEISS, COHAN, FELDMAN & SMALLEY, P.C.
Attorneys for Petitioner
1710 Spruce Street
Philadelphia, PA 19103
(215) 790-4567

159265

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

44pp

QUESTIONS PRESENTED

1. May a court grant a motion for summary judgment in a Federal Employer's Liability Act case for the negligent infliction of emotional distress where there exists a genuine issue of material fact on the "zone of danger test" issue: namely whether Plaintiff, a 30 year employee of Defendant railroad, who suffered from severe emotional distress which was directly caused by the threat of immediate physical harm when Defendant's employee threw rocks and a 2x4 at Plaintiff from just a few feet away and concurrently while the Defendant's employee was verbally threatening to kill Plaintiff, his wife and children, and to burn down his home, was in the "zone of danger"?

2. May a court grant a motion for summary judgment when the uncontroverted Affidavits of Plaintiff and Plaintiff's treating psychiatrist and the report of Plaintiff's expert psychiatrist raise a genuine issue of material fact in stating that Plaintiff's emotional distress was caused by the verbal and *physical* threats Plaintiff encountered during the rock and lumber throwing incident?

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Petitioner, Ronald T. Ferguson, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Third Circuit is listed in a Table at *Ronald T. Ferguson v. CSXT, Inc.*, __ F.3d __ (3d Cir. (Pa.) January 26, 2000) (Table, No. 99-1247) (Text Not Available on Westlaw). The opinion of the district court in *Ronald T. Ferguson v. CSXT, Inc.*, Case No. 99-1247 (March 1, 1999), can be found at 36 F. Supp.2d 253.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit ("Court of Appeals") was entered on January 26, 2000.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Federal Employer's Liability Act ("FELA") provides that "[e]very common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . ." 45 U.S.C.A. § 51.

Petitioner, Ronald Ferguson, filed this claim for the negligent infliction of emotional distress pursuant to the standard set forth in the case of *Consolidated Rail*

Corporation v. Gottshall, 512 U.S. 532, 114 S. Ct. 2396 (1994) and its progeny. FELA is a Federal Statute, therefore the United States District Court for the Eastern District of Pennsylvania had original jurisdiction.

STATEMENT OF THE CASE

There are two fundamental questions in this case. The first is whether a court may grant a motion for summary judgment in a Federal Employer's Liability Act case for the negligent infliction of emotional distress where there exists a genuine issue of fact on the "zone of danger test issue: namely, whether the Plaintiff, a 30 year employee of Defendant railroad, who suffered from severe emotional distress which was directly caused by the threat of immediate physical harm when Defendant's employee threw rocks and a 2x4 at Plaintiff from just a few feet away and concurrently while the Defendant's employee was verbally threatening to kill Plaintiff, his wife and children, and to burn down his home, was in the zone of danger.

The second fundamental question is whether a court may grant a motion for summary judgment when the uncontroverted Affidavits of Plaintiff and Plaintiff's treating psychiatrist and the report of Plaintiff's expert psychiatrist raise a genuine issue of material fact in stating that Plaintiff's emotional distress was caused by the verbal and physical threats Plaintiff encountered during the rock and lumber throwing incident. To fully appreciate the significance of the issues presented by this case, it is essential to consider its lengthy procedural background.

A. The Proceedings Below

Appellant, Ronald Ferguson, (Plaintiff below, hereinafter "Mr. Ferguson") filed this claim for negligent

infliction of emotional distress in June of 1997 pursuant to the Federal Employer's Liability Act, 45 U.S.C.A. § 51 *et seq.*, (hereinafter "FELA") and, more specifically, based upon the standard articulated in *Consolidated Rail Corporation v. Gottshall*, 512 U.S. 532, 114 S. Ct. 2396 (1994) and its progeny.

Since the events which gave rise to this matter, Mr. Ferguson has suffered from major depression and a severe anxiety disorder which has required ongoing psychiatric care, including hospitalizations for psychiatric instability. These psychiatric conditions are a direct result of a face-to-face confrontation with an employee of Appellee, CSX Transportation (Defendant below, hereinafter "CSX"). (See Appendix pages 1-9, the medical reports of Roy Fitzgerald, M.D., Mr. Ferguson's expert psychiatrist, and Appendix pages 10-15, the medical reports of Dr. Satyendera Diwan, Mr. Ferguson's treating psychiatrist, and Appendix page 16, Dr. Diwan's sworn Affidavit) (References throughout this petition are referring to the Third Circuit Appendix). This CSX employee, Larry Deery (hereinafter "Deery") threw rocks and an eight foot two by four (hereinafter "2x4") at Mr. Ferguson, thereby threatening imminent physical harm and causing Mr. Ferguson to fear for his life. Deery also simultaneously made terroristic threats against Mr. Ferguson's life and his family's life and well-being.

For years, Deery had displayed dangerous and vicious habits, and was known by CSX management, as well as multiple employees of CSX, to have repeatedly threatened physical bodily harm to CSX employees. Deery, a man of about 6' 4" weighing between 250 and 260 pounds, also exhibited other violent behaviors, all known to CSX management. Ferguson filed suit against CSX under FELA for negligent infliction of emotional distress based on the

rock throwing incident which was caused directly by CSX's failure to provide a safe work place.

At the close of discovery, CSX filed a Motion for Summary Judgment based primarily on the United States Supreme Court ruling in *Consolidated Rail Corporation v. Gottshall*, 512 U.S. 532, 114 S. Ct. 2396 (1994), which sets forth the standard for evaluating claims under FELA for negligent infliction of emotional distress. This is also the case which forms the legal basis for Plaintiff's claim. *Gottshall* is analyzed in detail, in the context of this case, in Mr. Ferguson's Reasons For Granting Writ, II, *infra*.

It remains Mr. Ferguson's contention that Mr. Ferguson was placed in the "zone of danger" as defined by *Gottshall* when CSX's long-term employee, Deery, threw rocks and a 2x4 at him, intending to grievously injure Mr. Ferguson. These attempts by Deery were part of a long standing pattern of violence and abuse perpetrated by Deery upon his fellow CSX workers. This history was well known to CSX. When Deery combined his propensity for threats, including threatening to kill Mr. Ferguson and his family, with actual, direct violent acts intending to cause Mr. Ferguson very real physical harm, Mr. Ferguson suffered the emotional injuries for which he has made this claim.[1]

---

1. CSX's version of the facts in its Summary Judgment Motion was based on a gross mischaracterization of what actually occurred on August 21, 1996, on what had occurred before that date, and on the harm caused Mr. Ferguson by CSX's negligent failure to terminate or control a known violent employee. CSX uses Mr. Ferguson's deposition testimony in a very unfair and misleading fashion, by picking and choosing quotations out of context in an attempt to bolster its arguments. Further, counsel for CSX never asked Mr. Ferguson if he was in fear for his life, or in fear of

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The District Court in reviewing CSX's Motion for Summary Judgment and Mr. Ferguson's Response thereto, stated that Mr. Ferguson had for the purposes of the underlying Summary Judgment Motion met his burden regarding negligence. (See Court Order from Summary Judgment). The Court agreed that CSX had notice or knowledge of its employee's exhaustive history of threatening behavior. *Id.* In spite of its belief that the incident between Ferguson and the CSX employee was foreseeable, the Court ruled that Ferguson was not in the "zone of danger" as defined by *Gottshall* during his face-to-face confrontation with Deery. In granting CSX's Motion for Summary Judgment, the District Court failed to consider the Affidavit of Plaintiff, Ron Ferguson (Appendix page 33), his treating psychiatrist, Dr. Diwan (Appendix page 16) or the reports of Plaintiff's expert psychiatrist, Dr. Roy Fitzgerald (Appendix pages 1-9). The District Court's Order granting summary judgment was entered on March 1, 1999. (See Appendix pages 107-117).

Plaintiff filed a Notice of Appeal on March 17, 1999 to the United States Court of Appeals for the Third Circuit. (See Appendix at page 118). On Appeal, the Court upheld the District Court's opinion and affirmed the District Court's judgment, without commenting on or distinguishing the Court's decision. The Court of Appeals' Order was entered on January 26. (See Appendix at page 119).

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imminent physical harm or injury, when Deery was hurling rocks and a 2x4 at him and threatening him with a multitude of terroristic threats. See Affidavit of Ron Ferguson at Appendix page 33.

B. Background of the March 1, 1999 District Court Judgment

Mr. Ferguson filed his Complaint in June of 1997 stating a claim for the negligent infliction of emotional distress caused by CSX Transportation. (See Plaintiff's Complaint at Appendix pages 17-24). The parties engaged in extensive discovery, involving the depositions of 15 witnesses. The facts reflect a history of incidents of violence and dangerous behavior by Larry Deery, a long-standing employee of CSX. (See summary contained in Plaintiff's management expert, Dr. Ryberg's report, at Appendix pages 25-32). Having permitted Deery's conduct to continue unabated, CSX permitted the foreseeable, ultimate violent episode involving Ronald Ferguson. Because the scope of review for this Court is de novo, a somewhat lengthy presentation of the facts is necessary.

Mr. Ferguson was frightened and terrorized while under a barrage of rocks and an eight foot 2x4 thrown from less than five feet away by Deery, who stands 6' 4" and between 250 and 260 pounds, while Deery simultaneously threatened, with obscenities and gestures, to kill him, to burn down his home, to kill his family and to cause him ultimate physical injury.

In more detail, the incident occurred as follows: On August 21, 1996, Deery, a yardmaster working for CSX, approached Mr. Ferguson, who at the time was on duty and on company grounds, and began screaming obscenities and threats directed at Mr. Ferguson. Deery threatened to kill Ferguson for "ratting his brother Phillip

out" to the train master, Rich Trincia. (See page 47 of Mr. Ferguson's deposition transcript at Appendix pages 38-53). Deery continued to scream at Ferguson and threatened to burn his home down and kill his family for what he had allegedly done to Deery's brother Phillip. Deery continued to rant and rave for about five to ten minutes before picking up rocks and throwing them directly at Ferguson. At one point, Deery picked up a 2x4 piece of lumber and threw it at Ferguson, intending to do him bodily harm. (See page 42 of Mr. Ferguson's deposition transcript at Appendix pages 38-53. Also, see Mr. Ferguson's statement at Appendix pages 34-37).

Mr. Ferguson could not specify the velocity of the 2x4, but he was clearly frightened by it. (See page 172 of Mr. Ferguson's deposition transcript at Appendix pages 38-53). In spite of the immediate shock and fear experienced by Ferguson, he managed to avoid being hit by the rocks and the 2x4. (*Id.* at 42). While a fence separated Deery and Ferguson, at one point Deery was within three feet of Ferguson and "he (Deery) had his nose through it (the fence)." (*Id.* at 136). Deery continued to challenge Ferguson to come over to him, saying that he would kill his family and burn his house down.

Apparently, Deery was enraged by Ferguson because in or about March or April of 1996, Ferguson had reported Phillip Deery, Larry Deery's twin brother, to the assistant trainmaster, Rich Trincia, for a safety violation. Thereafter, for the next month or month and a half, Ferguson had no problems or issues with Phillip Deery. Problems did, however, develop between Larry Deery and Mr. Ferguson at that time. Specifically, on two occasions, Deery threatened

to kill Mr. Ferguson for reporting his brother. (See pages 72 and 73 of Mr. Ferguson's deposition transcript at Appendix, pages 38-53). These threats were not face-to-face threats but were made over the hand held radio, to Philip Deery, but overheard by Mr. Ferguson. (*Id.* at 72-73). While these threats were clearly unsettling to Ferguson, there was no imminent threat of physical harm, and, therefore, Ferguson was not particularly bothered by them.

Moreover, Mr. Ferguson continued to work in spite of the verbal threats Deery had issued over the radio. It should be noted that when Deery verbally threatened Ferguson over the radio, Ferguson did not suffer any emotional breakdown. It was not until Deery threatened him with imminent physical harm by throwing rocks and a 2x4 at him in the face-to-face confrontation on August 21, 1996 that Ferguson suffered an emotional breakdown.

Mr. Ferguson has a long history as an emotionally stable, hard working employee. He began working for the railroad in 1966. He worked for roughly 25 years for CSX Transportation, first as a fireman and later as an engineer. He received several letters of commendation and a service award for his performance at CSX. (See Appendix pages 54-56, letters of commendation and letter of service award). According to John Allen (hereinafter "Allen"), the terminal manager, Ferguson was a good employee who was quiet and caused no problems. (See John Allen's deposition at Appendix pages 57-68). In 1991, Ferguson was diagnosed with Non-Hodgkins's lymphoma, and was quite ill for some time with this life threatening disease. He was forced to stop working and go on disability. He received a bone marrow transplant and participated in multiple chemotherapy

programs. (See Dr. Fitzgerald's report dated February 25, 1997 "Background Information" as seen at Appendix pages 1-9).

Mr. Ferguson ultimately overcame his bout with cancer, and instead of remaining permanently disabled as he could have, he voluntarily chose to return to work as an engineer for CSX Transportation in late 1993. Throughout his bout with cancer and near death experience, Mr. Ferguson remained emotionally strong. He at no time required psychiatric care, and, in fact, developed a new more optimistic and positive outlook on life following his recovery. (See Dr. Fitzgerald's report dated February 25, 1997 at Appendix pages 1-9). This is clearly not a man who would seize on any excuse not to work.

He enthusiastically returned to CSX Transportation in late 1993, but found that a completely new and distasteful work atmosphere had developed during his two plus year absence. CSX management appeared to tolerate vulgarity, verbal abuse, intimidation and other negative behavior from its employees, and, in particular, from Larry Deery. (See pages 85-86 of Mr. Ferguson's deposition transcript at Appendix pages 38-53 . Also, see summary submitted by Plaintiff's expert, Dr. Ryberg at Appendix pages 25-32).

Upon Ferguson's return, he was shocked to learn of an incident as described below involving Deery and Russell Marando (hereinafter "Marando"), another employee of CSX Transportation, in which Deery explicitly threatened Marando. Specifically, in August of 1993, Deery was being investigated for leaving work without authority. Prior to the investigation hearing, Deery called Marando on the telephone and threatened him and his family with bodily injury if Marando showed up at the hearing concerning Deery.

(Appendix pages 69-73 is the narrative report of Defendant, CSX police concerning the police investigation of threats by Deery dated August 11, 1993).

Marando advised CSX police that Larry Deery:

> In an intimidating manner, calls me on the telephone at home. He made reference to my children, asked me if I had children, told me not to show up on August 3, 1993 for the investigation, that there was only one way in and out of Wilsmere, that he had to buy some bullets, that he may as well go to jail if he can't have his job.
>
> Larry Deery advised Mr. Marando that, "He can get three square meals a day in jail, he has only known two places in this world, one of them was jail and one was the Railroad, and he couldn't go, if he couldn't work on the Railroad, he might as well go to jail."[2]

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2. The following is an additional exchange between Marando and Defendant CSX police investigating this incident:

> Q: In the last two years, have you known Larry to be a violent or unstable person, that displayed tendencies to be violent or threatening people?
>
> A: Oh yeah. All the time. It seems like it's a regular thing. He intimidates people all the time.
>
> Q: And do you honestly feel that he is capable of any violence towards you?
>
> A: I believe he has threatened me, yeah, he has threatened me at work here. To beat the crap out of

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At about the same time, CSX police also interviewed assistant trainmaster Richard Trincia. Mr. Trincia informed the CSX investigating officer that, "I have tried to handle Mr. Deery in the past, however, he has just gotten too far out of hand. At times, he acts like he's crazy or something." *Id.* CSX police reported that "He (Rich Trincia) was tired of all the annoyance and problems this boy has caused down here. 'There is something going on all the time involving this guy.' " *Id.* It is critical to note that this shocking conduct is part of Defendant's own records, and **pre-dates** the actions which are the subject of this case. This history is of critical importance with respect to gaining an understanding that Deery's violent actions towards Ferguson were real, not imagined, and that Ferguson's physical well-being was threatened on the day in question.

In spite of the terroristic threats Deery made to Marando in 1993, CSX management never formally

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> me, or to use more specific terms "beat the living shit out of me," or he has made threats here in the yard office, in reference to the postal, if anybody would remember the postal workers. Or how they take care of people they don't like, or something to that effect. You know they go in and shoot them and he had made mention of that several times here on the property.
>
> Q: How do you basically, what I am saying is, how do you feel, do you feel he is going to come and get you, or is he, has he left you with that feeling?
>
> A: I feel like this, I have told several people that are close to me, that if anything happens to me, remember his name, so what does that tell you.

investigated those allegations.[3] In fact, other than the CSX police investigation summaries attached hereto, there is no evidence of any kind that CSX management did anything with respect to these terroristic threats which were part of an ongoing pattern of conduct. (See Dr. Ryberg's report at Appendix pages 25-32).

Multiple CSX employees and management personnel testified at their depositions that Deery was constantly insubordinate to CSX management personnel, acted with vulgarity towards co-employees, was intimidating towards co-employees, destroyed company property, vandalized company property, and, among other things, made physical threats and racial slurs to individuals on company grounds. (A multitude of examples are outlined in Dr. Ryberg's report at Appendix pages 25-32).[4]

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3. At his deposition, Allen testified that he was unaware of Deery's threats to Marando and, further, that unless both employees were on company property and on duty, CSX police had no reason to report these threats to CSX management. (See pages 24-26 of John Allen's deposition transcript at Appendix pages 57-68). In August of 1993, Deery, at a formal investigation hearing, was discharged from service for leaving work without authority. (See report of CSX investigation/board of inquiry/hearing dated August 23, 1993 at Appendix pages 76-78). Ultimately, Deery filed an appeal of his dismissal, and based upon management's failure to properly prosecute Deery, Deery was permitted to return to work with full back pay in 1994. (See Public Law Board No. 5529 dated October 10, 1994, Award No. 5 reinstating Larry Deery at Appendix pages 79-80).

4. By example, Theresa Brown, an assistant trainmaster and occasional supervisor of Deery, testified that she believed Deery had a problem with women on the railroad and with her being his boss. (See pages 14-15 of deposition transcript of Theresa Brown at Appendix pages 81-86). Ms. Brown further testified that the

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There were many other incidents involving threatening and/or violent behavior by Deery. (See Appendix pages 25-32).[5] However, this behavior was ignored by CSX management, and thus CSX management simply failed to

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following message was next to her name on a CSX computer: "I was sucking cock." (*Id.* at 13). Ms. Brown advised CSX management that she believed the message was from Larry Deery. (*Id.* at 14, 17-18).

5. By further example, Richard Trincia also testified that he repeatedly discussed Deery's behavioral problems with Deery's direct supervisor, Allen. (See pages 40-43 of Richard Trincia's deposition transcript at Appendix pages 87-96). Specifically, Trincia believed Deery took a fire extinguisher off the wall and sprayed it all along the walls, the ceiling, the floor and computers. (*Id.* At 40-41). He believed Deery trashed company computers and tampered with CSX air conditioners. (*Id.* At 40-42). Trincia testified that the day after Deery returned to work, printers were destroyed. (*Id.* At 43). There is no indication anywhere in the record that CSX followed up with any investigations of these allegations. Trincia additionally testified that in 1989 or 1990, Deery literally broke into his office. (*Id.* At 65-66). He broke the door of Trincia's file cabinet and stole his own paycheck. *Id.* The only discipline Deery received for breaking into the assistant trainmaster's office and stealing his own paycheck was a thirty day suspension. (See pages 14-15 of John Allen's deposition transcript at Appendix pages 57-68). Trincia stated that the reason he is on disability for job-related stress is because of the following: (1) Larry Deery, (2) the "changing of the guard of the company" and (3) "their changing of policy." (*Id.* At 13-14).

Additionally, Pedro Perez (hereinafter "Perez"), a cleaning contractor hired by CSX to clean its offices, testified at his deposition that Deery threatened him with physical harm and yelled racial slurs at him. (See pages 22-27 of Pedro Perez' deposition transcript at Appendix pages 97-105). Perez reported these threats to Trincia and

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meet its responsibility and duty to provide a safe work place. (See Dr. Richard Ryberg's report at Appendix pages 25-32). It is Dr. Ryberg's opinion, to a reasonable degree of certainty, that the multiple CSX failures to investigate, record and report the serious Deery incidents constitute negligence on the part of CSX. *Id.* This negligence caused the unsafe work environment, resulting in the Ferguson incident, which forms the basis for this cause of action. *Id.*

It is also important to note that Deery was ultimately discharged from service by CSX as a direct result of his assault of Ferguson on August 21, 1996. (See notice of discharge at Appendix page 106). In fact, the bulk of Ferguson's allegations were confirmed by various witnesses who testified at Deery's formal investigation, which occurred almost one year after the incident. *Id.* There has never been a question by anyone associated with CSX concerning the veracity of Ferguson's allegations. John Allen insists that if Ferguson had initially reported the incident to him he would have "dialed 911" and had Deery "locked up." (See pages 47 and 48 of John Allen's deposition transcript at Appendix pages 57-68).

Thus, the overwhelming factual evidence clearly establishes that CSX ignored a long history of violent threatening conduct by Deery, and created a climate of fear

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Allen. (*Id.* at 27). In spite of Perez' complaints, Deery continued to harass Perez and his employees when Perez or his employees would attempt to do their jobs. (See pages 35-36 at Appendix pages 97-105). Allen admits that Perez reported to him that Deery screamed obscenities and racial slurs at Perez, but had no recollection of Perez reporting threats of physical harm. (See pages 39-40 of Allen's deposition at Appendix pages 57-68). Allen admits to discussing the incident with Deery but chose not to document the incident. (*Id.* at 40 and 41).

and frustration among its employees, including Mr. Ferguson. The incident involving Mr. Ferguson was entirely foreseeable.

The District Court recognized that Deery had an extensive record:

> The record is replete with examples of numerous problems Deery had with other co-workers during his tenure at CSX. In fact, Plaintiff exhaustively describes Deery's various past indiscretions and boorish behavior by citing to the depositions of several CSX employees. Thus, it is clear from the record that CSX had knowledge or notice of Deery's indiscretions and threatening behavior. Furthermore, for the purposes of this motion, the Court finds that CSX had notice of Deery's past behavior and it was foreseeable that the August 21, 1996 incident could occur. (See Opinion).

Further, it is Mr. Ferguson's contention that his injuries resulting from this incident were equally foreseeable. Most important, the uncontroverted Affidavits of Mr. Ferguson's treating psychiatrist states that Mr. Ferguson suffered severe emotional distress at the hands of Deery, who attempted to inflict actual physical harm upon him in a face-to-face confrontation on August 21, 1996, while simultaneously threatening him with death as well as direct physical harm. (See Appendix at pages 10-15). Surely, this evidence raises a genuine issue of material fact as to the cause of Mr. Ferguson's emotional breakdown.

REASONS FOR GRANTING THE WRIT

I. The Petition Should Be Granted Because The Opinions Below Conflict With This Court's Prior Rulings On The Standard For Summary Judgment.

Mr. Ferguson's petition for writ of certiorari should be granted because the opinions of the District Court and Court of Appeals in the instant action conflict with this Court's important prior rulings on the standard for summary judgment. This Court has consistently held that to grant summary judgment, a court must be convinced that the prevailing party has successfully demonstrated "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737 U.S. 744 (3d Cir. 1996). *Anderson v. Liberty Lobby*, 477 U.S. 242, 250 (1986); Accord *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavit, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." To grant summary judgment, a court must be convinced that the prevailing party has successfully demonstrated "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Ideal Dairy Farms* at 744. *Anderson v. Liberty Lobby*, 477 U.S. 242, 250 (1986); Accord *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. *Ideal Dairy Farms* at 744. *Anderson v. Liberty Lobby, Inc.*,

477 U.S. at 255. Further, summary judgment may not be granted if there is disagreement over what inferences can be reasonably drawn from the facts, even if the facts are undisputed. *Ideal Dairy Farms* at 744. Further, a trial court should not act other than with caution in granting summary judgment and may deny summary judgment where there is reason to believe that the better course would be to proceed to a full trial. *See Anderson* at 251, 255. Any fact question on a genuine issue of material fact will preclude the grant of summary judgment. *Id.* Mr. Ferguson's petition should be granted so that the Court may affirm the importance of its longstanding holdings on the proper standard of summary judgment.

II. The Petition Should Be Granted Because the Opinions Below Conflict With This Court's Prior Rulings On the "Zone Of Danger" Test As Established Under FELA and *Gottshall.*

Mr. Ferguson's petition for writ of certiorari should be granted because the opinions below conflict with this Court's rulings on the "Zone of Danger" Test as interpreted from the FELA and established in the case of *Consolidated Rail Corporation v. Gottshall*, 512 U.S. 532, 114 S. Ct. 2396 (1994). The Courts below failed to recognize that under the standard of the FELA and *Gottshall* for negligent infliction of emotional distress, Ferguson's evidence raises genuine issues of material fact.

A. The Courts Below Committed Error in Ruling That Mr. Ferguson was not in the "Zone of Danger" and That Therefore His Emotional Distress Could Not Have Resulted From His Fear of Imminent Physical Harm.

In *Consolidated Rail Corporation v. Gottshall*, 512 U.S. 532, 114 S. Ct. 2396 (1994), the United States Supreme Court, in an opinion by Justice Clarence Thomas, recognized that an emotional injury, even absent physical injury, is a valid cause of action under FELA. In *Gottshall*, the Supreme Court reviewed the various states' laws regarding negligent infliction of emotional distress and established a standard under federal common law. The Court adopted the "zone of danger test" and recognized a right of recovery for emotional injury for those plaintiffs who *either* sustained a physical impact as a result of defendant's negligence *or* "*are placed in immediate risk of physical impact by that negligence.*" *See Gottshall* at 2399-2400.

In *Gottshall*, the district court granted defendant's motion for summary judgment, but the Court of Appeals for the Third Circuit reversed. The Supreme Court found that the Third Circuit's standard was erroneous, because it was not based on federal common law. In analyzing the standard for negligent infliction of emotional distress, the Supreme Court found that both the physical impact test and *Dillon v. Legg*, 68 Cal. 2d 728, 69 Cal. Rptr. 72 (1968) "relative bystander requirement were too restrictive[6], based on the Congressional mandate to construe broadly and liberally

6. *Dillon v. Legg*, 68 Cal. 2d 728, 69 Cal. Rptr. 72 (1968) allowed for recovery for negligent infliction of emotional distress without physical impact only when a plaintiff witnessed injury to a relative, and plaintiff himself was in the zone of danger.

potential claims under FELA. *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957).

In adopting the zone of danger test, the Court stated,

> Based on the realization that "a near miss may be as frightening as a direct hit" (*Gottshall* citing *Pearson*, U.Fla.L.Rev., at 488) the zone of danger test affords recovery for emotional injury to those plaintiffs who sustained a physical impact as a result of the defendant's negligent conduct, *or who are placed in the immediate risk of physical harm by that conduct.*

(Emphasis added). *See Gottshall* at 2406. The Supreme Court saw no reason to allow an employer to escape liability for emotional injury caused by the apprehension of physical impact, simply because of the fortuity of the fact that the impact did not occur. *Gottshall* at 2411. Thus, railroad employees are able to recover for injuries, physical and/or emotional, caused by the conduct of another railroad employee, that threatens them imminently with physical harm when such conduct has been allowed to occur due to the negligence of the defendant railroad. *See Gottshall* at 2411.

Gottshall did not address the issue of negligent infliction of emotional distress that occurs when a plaintiff is threatened with terroristic threats at the same time he is being threatened with physical harm. Thus, this is a case of first impressions under the *Gottshall* standard. In light of the Supreme Court's recognition of the Court's duty to consider claims brought under the FELA broadly and liberally, *see Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957), it seems clear that imminent threat of physical harm combined with verbal threats to kill the victim and his family

should constitute a cognizable claim. The Supreme Court stated that the imminent threat of physical harm gives rise to a cause of action under the FELA if the victim of that threat has been denied a safe place to work by the defendant railroad's negligence. It does not make sense that if the defendant railroad's negligence has denied its employee a safe place to work by exposing him to both the imminent threat of physical harm and an accompaniment of threats to kill the employee/victim and his family, the defendant railroad is somehow protected from the consequences of its negligent conduct.

In its Summary Judgment Motion, CSX argued that Mr. Ferguson failed to meet the *Gottshall* threshold by suggesting that even if Mr. Ferguson was in the zone of danger, he has no cause of action because his emotional distress was caused by the terroristic threats to his personal safety and to that of his family, and not by the physical assault by defendant's employee Deery. Both the District Court and the Court of Appeals agreed. In so doing, they ruled on Ferguson's state of mind at the time of the attack, even though uncontroverted affidavits submitted by Mr. Ferguson and his treating physician, and by his expert witness psychiatrist clearly stated the exact opposite of the Courts' findings. Defendant offered no affidavits, or other evidence to eliminate these questions of fact.

Moreover, since Deery was screaming death threats while simultaneously throwing rocks and an eight foot long 2x4 at Mr. Ferguson, it would seem impossible to surgically separate the two offenses. The CSX approach, with which the lower courts agreed, was to simply ignore the physical violence, i.e., the thrown rocks and 2x4. But it was the face-to-face confrontation and the actual threats and the actual threat of imminent physical harm, that triggered

Mr. Ferguson's very real fear that Deery would then and there carry out his stated threat of killing Mr. Ferguson, and thereafter his wife and children. (See Appendix at page 33, Mr. Ferguson's Affidavit, and page 133 of Mr. Ferguson's deposition transcript at Appendix pages 38-53).

The evidence points directly to the conclusion that, then and there, Ferguson was in fear of immediate physical harm while the rocks and 2x4 were being thrown at him by Deery from three feet away. It was the fear of being struck by the rocks and 2x4, along with the simultaneous death threats, that were the direct cause of the emotional breakdown which followed. The inference must be drawn from Mr. Ferguson's previous behavior that it was only the threat of imminent physical injury that caused the emotional breakdown which kept him out of work. Cancer and previous death threats over the telephone by the same man had failed to cause any such emotional injury.

CSX cited two cases to support its argument that Mr. Ferguson's emotional condition was not caused by fear of imminent physical harm, as required by *Gottshall*, namely, *Bianco v. Philadelphia, Bethlehem and New England Railroad Company*, 1995 WL89036 (E.D. Pa.) and *Metro-North Commuter Railroad Company v. Buckley*, 117 S. Ct. 2113 (1997). Neither the District Court nor the Court of Appeals mentioned either case, perhaps in recognition that neither case is applicable to the present case, however, a brief discussion seems appropriate.

In *Bianco*, the plaintiff was told that if he refused to undergo training to operate locomotives, he would be fired. Plaintiff refused on the ground that the training program was no good, and that he would therefore cause accidents if he were forced to operate the locomotive. The Court held that

the threat of physical harm was not imminent, as there had been no accident (or even a near miss) involving the plaintiff, nor any evidence of the inadequacy of the training program. In the present case, of course, there is abundant evidence of negligence on the part of management and a clear threat of imminent physical harm from the rocks and 2x4 that were thrown at Ferguson.

The *Buckley* decision involves an asbestos case. It is well known that special rules have been fashioned in this unique area of the law to weed out claims that are insufficient or not ripe. While there is no specific federal common law detailing when a plaintiff can file an asbestos-related lawsuit, general common law principles recognize that a plaintiff who originally suffered from a compensable non-malignant asbestos-related disease may bring a first action upon discovering the condition, and may bring a second action if and when he or she develops cancer. *See Marinari v. Asbestos Corp.*, 417 Pa. Super. 440 (1992). *Marinari* recognized that since there is no medical connection between the non-malignant and malignant condition, a plaintiff may not recover for speculative future damages regarding fear of cancer in a lawsuit filed for a non-malignant condition.

The plaintiff in *Buckley* argued that he had a fear of future cancer because of long term exposure to asbestos. Plaintiff had neither asbestosis nor pleural thickening, nor any of the indicia of a problem caused by asbestos. His claim, quite simply, was not ripe. More importantly, an asbestos plaintiff may bring two separate and distinct claims if the appropriate conditions develop. Mere fear of future cancer will not suffice.

In the present case, Mr. Ferguson's emotional distress is not based upon some speculative fear of future events.

Rather, his life was in danger in August of 1996, when Deery threw rocks and a 2x4 at him in an effort to inflict serious harm upon him, and he reasonably feared for his life. Clearly, Mr. Ferguson was in the zone of danger at that time. The sequelae to that event is a harsh reality for Mr. Ferguson, with which he lives every day of his life. Mr. Ferguson's injuries are real, debilitating, and have virtually ruined his life.

B. The Uncontroverted Affidavits of Mr. Ferguson's Treating Psychiatrist and Expert Psychiatrist Establish the Cause of His Emotional Injury, The Physical Confrontation With Deery.

Based upon the opinions of Plaintiff's expert psychiatrist and Plaintiff's treating psychiatrist, Plaintiff has clearly met the burden of proof as required by *Gottshall*. Neither the District Court nor the Court of Appeals mentioned Mr. Ferguson's medical documentation, and thus presumably did not consider it. CSX submitted no medical reports whatsoever.

The uncontroverted reports of Mr. Ferguson's expert psychiatrist, Dr. Fitzgerald, clearly establish the cause of Mr. Ferguson's present emotional distress. Dr. Fitzgerald has examined and evaluated Mr. Ferguson on several occasions and in his report of February 25, 1997, discussed, in great detail, the physical threats Ferguson faced at the hands of Deery on August 21, 1996. Dr. Fitzgerald specifically connects Mr. Ferguson's current emotional instability to the physical and verbal threats by Deery on August 21, 1996. (See Appendix at pages 1-9, Dr. Fitzgerald's reports). Even if CSX had to have Mr. Ferguson examined by its own psychiatrist, (which it did not), certainly Dr. Fitzgerald's report would still raise a genuine issue of material fact.

Additionally, Dr. Diwan fully supports Dr. Fitzgerald's concerning the cause of Mr. Ferguson's condition. Specifically, Mr. Ferguson's treating psychiatrist, Dr. Diwan states in his Affidavit: "I believe that the *combination* of the physical and verbal threats made by Deery at Ron Ferguson, as well as Deery's known history of violent behavior which caused terror and fear of immediate physical harm, directly resulted in severe and permanent psychological damage to Ron Ferguson." (See Appendix at pages 10-15, emphasis added). As stated previously, it is inconceivable that a combination of verbal and physical threats could bar a claim under the FELA.

CSX failed to produce any medical opinion contradicting the opinions of Dr. Diwan and Dr. Fitzgerald that Mr. Ferguson has sustained severe emotional injury as a direct result of the physical and verbal threats he faced on August 21, 1996, at the hands of Larry Deery, and, therefore, those opinions must be accepted on the issue of causation.

Mr. Ferguson's petition should be granted so that this Court may affirm its holding on the "Zone of Danger" Test which it established in the *Gottshall* case. Also, if the lower courts' interpretation of this Court's "Zone of Danger" test is allowed to stand, the Congressional mandate to construe potential claims under FELA broadly and liberally will be frustrated.

CONCLUSION

Plaintiff/Appellant, Ronald Ferguson, has solid evidence supporting his claim for negligent infliction of emotional distress under *Gottshall*. Mr. Ferguson was within the "zone of danger" as defined by *Gottshall* when, according to his own Affidavit and that of his treating psychiatrist, he suffered a severe emotional breakdown as a result of risk of physical impact when the Defendant's employee threw rocks and a 2x4 at him while threatening to kill him, burn down his house, and kill his wife and children. At a minimum, the Plaintiff raises a material issue of fact as to whether his injuries resulted from the fear of physical impact and the face-to-face confrontation of Defendant's employee. Accordingly, Mr. Ferguson respectfully request that his petition for writ of certiorari be granted.

Respectfully submitted,

LAWRENCE R. COHAN
Counsel of Record
ANAPOL, SCHWARTZ, WEISS, COHAN,
FELDMAN & SMALLEY, P.C.
Attorneys for Petitioner
1710 Spruce Street
Philadelphia, PA 19103
(215) 790-4567

APPENDIX

APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JANUARY 26, 2000

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-1247

RONALD T. FERGUSON

Appellant,

CSX TRANSPORTATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 97-cv-03945)
District Judge: Honorable Eduardo C. Robreno

Submitted Under Third Circuit LAR 34.1(a)
November 1, 1999

BEFORE: NYGAARD, MCKEE and ROSENN,
Circuit Judges.

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a) on November 1, 1999.

Appendix A

On consideration whereof it is now ordered and adjudged by this court that the judgment of the District Court entered on February 26, 1999, is hereby **AFFIRMED**.

Costs taxed against appellant.

ATTEST:

s/ P. Douglas Sisk
Clerk

Date: January 26, 2000

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED AND FILED FEBRUARY 26, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 97-3945

RONALD T. FERGUSON,

Plaintiff,

v.

CSX TRANSPORTATION,

Defendant.

MEMORANDUM

EDUARDO C. ROBRENO, J. February 25, 1999

I. INTRODUCTION

Plaintiff, Ronald T. Ferguson has filed a claim pursuant to the Federal Employer's Liability Act, 45 U.S.C. § 51 ("FELA") against his former employer, CSX Transportation ("CSX"). Specifically, plaintiff has brought a claim under FELA for the negligent infliction of emotional distress caused by defendant CSX. Before the Court is defendant's motion for summary judgment. Because plaintiff was not

within the "zone of danger" as articulated by the United States Supreme Court in Gottshall, defendant's motion will be granted.

II. FACTS

The following facts are not in dispute or are construed in the light most favorable to the plaintiff. On or about August 21, 1996, Larry Deery ("Deery")[1], an employee of CSX who was off-duty at the time of this incident, drove his car to the site where plaintiff was working and began screaming obscenities and threats directed at plaintiff. At the time, plaintiff was working at CSX's rail yard in Willsmere, Delaware. According to plaintiff, Deery threatened to kill him for reporting to a CSX supervisor some indiscretions on the part of Deery's brother, Phillip Deery, who was also an employee of CSX.[2] Plaintiff alleges that, for a period of

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1. The record is replete with examples of numerous problems Deery had with other co-workers during his tenure at CSX. In fact, plaintiff exhaustively describes Deery's various past indiscretions and boorish behavior by citing to the depositions of several CSX employees. Thus, it is clear from the record that CSX had knowledge or notice of Deery's indiscretions and threatening behavior. Furthermore, for the purposes of this motion, the Court finds that CSX had notice of Deery's past behavior and it was foreseeable that the August 21, 1996 incident could occur. Although plaintiff may be able to satisfy this element of his negligence claim, as discussed in full below, defendant's motion will be granted since CSX did not owe plaintiff a legal duty since he was not within the zone of danger.

2. In or about March or April of 1996, plaintiff had reported Phillip Deery to a supervisor for safety violations. Although plaintiff (Cont'd)

about five to ten minutes, Deery continued to scream at him, threatening to burn down his home and kill his family.

Initially, when the verbal abuse began, plaintiff was standing next to a running locomotive and Deery was inside his parked car, behind a fence, approximately fifty (50) feet away. However, because Deery was in his car and plaintiff was some distance away standing next to a running train, plaintiff could not hear exactly what Deery was saying. As a result, plaintiff began walking toward the fence separating him from Deery. At that point, continuing the verbal assault towards plaintiff, Deery exited his car and also walked toward the fence separating the two individuals. According to the plaintiff, the two were now three (3) to five (5) feet away, still separated by the fence. After verbally threatening plaintiff for a few more minutes, Deery picked up some rocks and stones, as well as a 2x4 piece of lumber and threw them at plaintiff. It is undisputed that plaintiff was not hit by any of the objects Deery threw at him.[3] Following Deery's tirade

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(Cont'd)
did not have any run-ins with Phillip Deery, Larry Deery allegedly threatened to kill plaintiff on two previous occasions. These threats, however, were never face-to-face threats, but were made over a hand-held radio and overheard by plaintiff. Plaintiff admits that while these threats were unsettling, there was no imminent threat of physical harm.

3. Thus, it is clear that plaintiff seeks recovery for "purely emotional claims". The Third Circuit defines "purely emotional claims" as a "mental disturbance unaccompanied by a contemporaneous infliction of physical injury." *Gottshall v. Consolidated Rail Corporation*, 56 F.3d 530, 533 n.3 (3d Cir. 1995) (citing *Bloom v.*
(Cont'd)

of both words and rocks, plaintiff alleges that Deery returned to his car and made slashing motions across his throat before driving out of the area.[4]

As a result of this confrontation, plaintiff claims to have suffered severe emotional distress. Since the incident, plaintiff has been continuously fearful for his life and that of his family. In addition, he has been unable to work and has difficulty concentrating. Lastly, plaintiff has suffered from major depression and severe anxiety disorder which has required long-term psychiatric care.

III. LEGAL STANDARD

Summary judgment is appropriate if the moving party can "show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). When ruling on a motion for summary judgment, the Court must view the evidence in the

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(Cont'd)
Consolidated Rail Corp., 41 F.3d 911, 915 n.5 (3d Cir. 1994)). Although the Third Circuit has not decided "whether emotional distress, to be actionable must produce accompanying physical manifestations in reaction to the mind's disturbance", *see id.*, for the purposes of this motion, the Court concludes that plaintiff has sufficiently demonstrated an accompanying physical manifestation.

4. Although the plaintiff alleges that he presently believes that Deery will carry out his threats to harm him and his family, it is undisputed that since the incident he has not heard from nor had contact with Deery. *See* Dep. of Ronald T. Ferguson, at 102, 133 ("Pl.'s Dep."). In fact, Deery was fired as a result of this incident with plaintiff. *See* Pl.'s Ex. S.

light most favorable to the non-movant. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The Court must accept the non-movant's version of the facts as true, and resolve conflicts in the non-movant's favor. *Big Apple BMW, Inc. v. BMW of N. Amer., Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992), *cert. denied*, 507 U.S. 912 (1993).

The moving party bears the initial burden of demonstrating the absence of genuine issues of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Once the movant has done so, however, the non-moving party cannot rest on its pleadings. *See* Fed. R. Civ. P. 56(e). Rather, the non-movant must then "make a showing sufficient to establish the existence of every element essential to his case, based on the affidavits or by depositions and admissions on file." *Harter v. GAF Corp.*, 967 F.2d 846, 852 (3d Cir. 1992); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Furthermore, in order for a court to grant summary judgment in a FELA negligence case, the defendant must demonstrate the absence of a genuine issue of material fact on at least one of the required elements for negligence and that the issue should be resolved in its favor as a matter of law. *See, e.g., Smolsky v. Consolidated Rail Corp.*, 780 F. Supp. 283, 290 (E.D. Pa. 1991); *Lauria v. National R.R. Passenger Corp.*, No. 95-1561, 1997 WL 83767, at *3 (E.D. Pa. Feb. 20, 1997).

Appendix B

IV. ANALYSIS

A. *Recovery Under the FELA*

The FELA provides that "[e]very common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . . ." 45 U.S.C.A. § 51 (West 1986). However, FELA is not a workers' compensation statute and does not require railroad employers to insure the safety of their employees. *See, e.g., Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994); *Inman v. Baltimore & Ohio R.R. Co.*, 361 U.S. 138, 140 (1959). Nevertheless, the Supreme Court has liberally construed FELA to further the statute's broad remedial goal. *Gottshall*, 512 at 543.

The traditional common law negligence elements of duty, breach, foreseeability, causation and damages apply in an action brought under FELA. *Robert v. Consolidated Rail Corp.*, 832 F.2d 3, 6 (1st Cir. 1987); *see also Finley v. National R.R. Passenger Corp.*, No. 95-3594, 1997 WL 59322, at *3 (E.D. Pa. Feb. 12, 1997); *Lauria*, 1997 WL 83767, at *2 (E.D. Pa. Feb. 20, 1997) *Walsh v. Consolidated Rail Corp.*, 937 F. Supp. 380, 383 (E.D. Pa. 1996). The question in this case is whether, under the circumstances of this case, defendant owed plaintiff a legal duty.

B. *Claims for Negligent Infliction of Emotional Distress Under the FELA — Zone of Danger Test.*

The United States Supreme Court, in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), outlined the standard

to be applied when considering claims for negligent infliction of emotional distress under the FELA. In *Gottshall*, the Supreme Court held that "an emotional injury constitutes 'injury' resulting from the employer's 'negligence' for purposes of FELA only if it would be compensable under the terms of the zone of danger test." *Id.* at 555 (citing 45 U.S.C. § 51). It defined the zone of danger test by stating that the law "limits recovery of emotional injury to those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct." *Id.* at 547-48. According to the Third Circuit, "[t]he Supreme Court adopted the zone of danger test, in part, to limit defendants' liability to certain classes of plaintiffs and to certain types of harm, notwithstanding that some genuine claims would be foreclosed." *Bloom v. Consolidated Rail Corp.*, 41 F.3d 911, 914 (3d Cir. 1994) (citing *Gottshall*, 512 U.S. at 552).

The Third Circuit has concluded that under *Gottshall*, when plaintiff asserts a claim for negligent infliction of emotional distress, a defendant will owe the plaintiff a legal duty only if: 1) the plaintiff sustained a physical impact or 2) plaintiff was placed in immediate risk of physical harm or threatened imminently with physical impact. *Bloom*, 41 F.3d at 915-16. It is clear from the record that plaintiff did not sustain a physical impact. Plaintiff testified at his deposition and concedes in his Response that he was never hit by any of the objects thrown by Deery. *See* Pl.'s Dep. at 43, 100; Pl.'s Br. in Resp. to Defs.' Mot. for Summ. J. at 5. Therefore, the only issue remaining is whether, under the circumstance, does plaintiff satisfy the second prong of the *Bloom* test.

Appendix B

Plaintiff's deposition testimony clearly reveals that the emotional distress he claims was not the result of the fear of immediate physical harm from being hit by the objects thrown over the fence by Deery, but rather by the fear of the threats of future harm which Deery was making toward plaintiff and his family. *See* Pl.'s Dep. at 99. As he testified at his deposition, due to these threats, he remains in constant fear and has suffered severe emotional distress. Pl.'s Dep. at 99-100; Pl.'s Exs. C, F.[5] This Court concludes that the fear of some future harm caused by verbal threats is insufficient to place plaintiff within the actionable zone of danger because these threats of future harm did not place plaintiff "in *immediate* risk of physical harm or threatened [him] *imminently* with physical impact." *Bloom*, 41 F.3d at 915-16. The fear plaintiff suffered due to the threat to burn down his house, as well as the threat of future harm to plaintiff and his family is, therefore, not compensable. *Cf. Krause v. Security Search & Abstract Co. of Phila., Inc.*, Nos. 96-595, 96-5742, 1997 WL 528081, at *8 (E.D. Pa. Aug. 21, 1997) (verbal threats made to plaintiffs about physically harming family members not enough to meet Pennsylvania's zone of danger test and allow recovery for negligent infliction of emotional distress).

An appropriate Order follows.

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5. Plaintiff's consulting physician also recognized that plaintiff's fear stems from the threats of future harm. *See* Pl.'s Ex. A at 2-3. The doctor states that plaintiff "has been continuously fearful for his life and for that of his family since leaving railroad work after making a formal complaint against the Deery brothers for the threats to kill him . . . ." *Id.* at 3.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 97-3945

RONALD T. FERGUSON,

Plaintiff,

v.

CSX TRANSPORTATION,

Defendant.

ORDER

AND NOW, this **25th** day of **February, 1999,** upon consideration of defendant CSX Transportation's motion for summary judgment (doc. no. 19), plaintiff's response (doc. no. 27), and defendant's reply thereto (doc. no. 28), it is hereby **ORDERED** that:

1. Defendant's motion for summary judgment is **GRANTED**; and

2. **JUDGMENT** is **ENTERED** in favor of defendant and against plaintiff.

The clerk shall mark this case **CLOSED**.

AND IT IS SO ORDERED.

s/ Eduardo C. Robreno
EDUARDO C. ROBRENO, J.

Supreme Court, U.S.
FILED
MAR 17 2000
CLERK

(2)

No. 99-1714

IN THE

Supreme Court of the United States

RONALD T. FERGUSON,

Petitioner,

v.

CSX TRANSPORTATION, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

JOHN J. BARRETT, JR.
Counsel of Record
PATRICK J. WOLFE, JR.
TERRI A. PAWELSKI
SAUL, EWING, REMICK & SAUL LLP
Attorney for Respondent
1500 Market Street – 38th Floor
Philadelphia, Pennsylvania 19102
(215) 972-7767

159764

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

12pp

STATEMENT PURSUANT TO RULE 29.6

Respondent, CSX Transportation, Inc., is a wholly owned subsidiary of CSX Corporation which is publicly traded.

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Fed. R. Civ. P. 56(c) 2

REASONS FOR DENYING THE WRIT

This case presents a negligent infliction of emotional distress claim under the Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51. The District Court granted Respondent summary judgment after fully considering the Petitioner's arguments in opposition regarding the supposed existence of a material fact sufficient to deny summary judgment to Respondent. The District Court rejected those arguments by concluding that there was, in actuality, no genuine issue of material fact related to the critical zone of danger analysis. The District Court concluded, based on Petitioner's own sworn deposition testimony and on the affidavit of his consulting physician/expert witness, that the emotional distress that Petitioner claims he suffered was not the result of the fear of immediate physical harm from objects thrown at him (which did not hit him), but was rather the result of threats of *future* harm that were made to Petitioner and his family. For this reason, the District Court concluded that Petitioner could not satisfy the requirements of *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), for the assertion of a negligent infliction of emotional distress claim under the FELA. This determination was reviewed by the United States Court of Appeals for the Third Circuit and unanimously affirmed.

Fear of future harm caused by verbal threats of such future harm is insufficient to place Petitioner within the actionable zone of danger test enunciated by this Court in *Gottshall*, *supra*. Both the District Court, and the Court of Appeals, applied the proper legal standards in the proper manner in reaching their decisions. For these reasons, this Court should deny the Petition for a Writ of Certiorari.

I.

THE DISTRICT COURT, AND THE COURT OF APPEALS, APPLIED THE PROPER LEGAL STANDARDS IN REACHING THEIR DECISIONS AND PETITIONER'S ASSERTED ERROR CONSISTS OF NOTHING MORE THAN A DISAGREEMENT AS TO A FACTUAL FINDING.

A. The Standard For Summary Judgment.

The District Court's ruling on Respondent's Motion For Summary Judgment was based on Rule 56(c) of the Federal Rules of Civil Procedure, which provides that summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Rule 56 mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

In his Petition, Petitioner presents the question "[m]ay a court grant a motion for summary judgment in a Federal Employer's Liability Act case for the negligent infliction of emotional distress where there exists a genuine issue of material fact on the 'zone of danger test' issue. . . ."

(*See* Petition at i). Whether there exists in reality in this case any genuine issue of material fact was previously argued by Petitioner and decided against him by the District Court, which decision was unanimously affirmed by the Third Circuit. As the District Court stated in its opinion:

> Plaintiff's deposition testimony clearly reveals that the emotional distress he claims was not the result of the fear of immediate physical harm from being hit by the objects thrown over the fence by Deery, but rather by the fear of the threats of future harm which Deery was making toward plaintiff and his family.

See Petitioner's Appendix B at 10a.

Now, Petitioner asserts that this was an erroneous finding of fact concerning the cause of Petitioner's alleged emotional distress. It is undisputed, however, that the District Court applied the correct standard for the granting of summary judgment. (*See* Petitioner's Appendix B at 6a-7a). The Court of Appeals reviewed the District Court's analysis and unanimously affirmed it. A revisiting of that analysis of the factual evidence is not something that should warrant this Court's review.

B. The Standard For Recovery In A Negligent Infliction Of Emotional Distress Claim Under The Federal Employers Liability Act.

This Court, in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), set forth the legal standard to be applied when considering claims for negligent infliction of emotional distress under the FELA. In *Gottshall*, this Court held that

"an emotional injury constitutes 'injury' resulting from the employer's 'negligence' for purposes of FELA only if it would be compensable under the terms of the zone of danger test." *Id.* at 555 (*citing* 45 U.S.C. § 51). This Court defined the zone of danger test by stating that the law "limits recovery of emotional injury to those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in *immediate risk of physical harm by that conduct.*" *Id.* at 547-48 (emphasis supplied). This was the standard applied by the District Court in deciding Respondent's Motion for Summary Judgment, and by the Court of Appeals in reviewing the District Court's ruling granting Respondent summary judgment.

The District Court correctly stated the applicable rule of law and properly applied that rule of law to the resolution of Respondent's Motion for Summary Judgment. The Court of Appeals reviewed the District Court's analysis and unanimously affirmed it. The Petitioner herein fails to demonstrate any reason for another review of this Court's recognition of the substantial limitations on emotional distress claims, nor any reason for review of the District Court and the Court of Appeals' application of those limitations to respondent's Motion for Summary Judgment.

II.

THE DECISION OF THE DISTRICT COURT, AS AFFIRMED BY THE COURT OF APPEALS, REPRESENTS THE APPLICATION OF THE PROPER RULE OF LAW IN THE PROPER MANNER.

Both the District Court and the Court of Appeals on review were presented with an abundance of evidence that substantiated a determination that no genuine issue of material fact existed with regard to the critical zone of danger analysis, in that Petitioner's alleged emotional distress was caused by threats of future harm.

In his sworn deposition testimony, considered by the District Court and by the Court of Appeals, Petitioner repeatedly testified that the physical danger of being hit by a 2 x 4 or a stone on the day of the incident was not what caused him emotional distress. Rather, his alleged distress was caused by the threat of future harm to him and his family. At his deposition, Petitioner testified:

page 99

20 Q. But, Mr. Ferguson, your concern was that
21 Larry Deery was going to do something to you in the
22 future; is that right?
23 A. Larry Deery is very capable of doing
24 something to me in the future.

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1 Q. I understand, but I'm just trying to get to
2 the basis of your concern. It was that Larry Deery
3 was going to do something to harm you one way or
4 another in the future; is that right?
5 A. Yes, sir; me, my family, somebody being
6 associated with me.
7 Q. Either you or your family?
8 A. Right. He could walk in here right now and
9 shoot you.

SA 17-18: Ferguson Dep. at 99-100.[1] In addition to the above, on several other occasions during his deposition Petitioner made it quite clear that fear of future harm was causing his distress. *See, e.g.*, SA 24: Ferguson Dep. at 138-39 (stating that the reason Petitioner does not go back to work is fear that Deery might retaliate against him); SA 24: Ferguson Dep. at 141 (stating the reason for his nervousness was fear of future retaliation); SA 32-33: Ferguson Dep. at 189-92 (stating that his problems sleeping, eating, exercising and to his family life were caused by fear of future retaliation).

At his deposition Petitioner also testified as follows:

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24 Q. So back as far as the night of the 20th is

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1 concerned, what your fear, your concerns, your fear
2 or concerns were as a result of what Larry Deery

1. Citations noted as "SA" refer to Respondent's Supplemental Appendix submitted to the United States Court of Appeals for the Third Circuit.

3 *said to you* that night; is that correct?
4. A. Yes Sir.

SA 17 (emphasis supplied).

Even viewed in a light most favorable to the Petitioner, it was clear to the District Court and to the Court of Appeals that what Petitioner feared — and what caused him emotional distress — did not flow from being in the zone of danger of being hit by a thrown object. What Petitioner feared — and what caused him emotional distress — was what Mr. Deery *said* to him that night, specifically the threat of future harm to him and to his family. Petitioner's own deposition testimony clearly established this. Moreover, the District Court also noted that it considered Petitioner's consulting physician/expert witness's report, and that he too recognized that Petitioner's fear stemmed from such threats of future harm. (*See* Petitioner's Appendix B at 10a).

Fear of future harm caused by verbal threats of such is insufficient to place Petitioner within the actionable zone of danger, because these threats do not place Petitioner in immediate risk of physical harm, or threaten him imminently with physical impact. The emotional distress that Petitioner claims he suffers is, therefore, not compensable under this Court's Opinion in *Gottshall*. Thus, the decisions of the District Court in granting summary judgment to Respondent, and the Court of Appeals in unanimously affirming that summary judgment represent the proper application of a properly stated and established rule of law. This case presents neither a novel issue of law, nor any conflict in existing law. Thus, this Court should deny this Petition.

CONCLUSION

After considering the relevant facts and the applicable rule of law, the District Court found that there was no genuine issue of material fact involved in the critical zone of danger analysis, and properly held that Petitioner had failed to satisfy the zone of danger test adopted by this Court in *Gottshall*. The Court of Appeals reviewed the findings of the District Court, and the application of the applicable rule of law, and unanimously affirmed the District Court. This case raises no issue which warrants this Court's Review and the Petition should be denied.

Respectfully submitted,

JOHN J. BARRETT, JR.
Counsel of Record
PATRICK J. WOLFE, JR.
TERRI A. PAWELSKI
SAUL, EWING, REMICK & SAUL LLP
Attorney for Respondent
1500 Market Street – 38th Floor
Philadelphia, Pennsylvania 19102
(215) 972-7767